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In the
Supreme Court of the United States

BENJAMIN J. CAYETANO AND EARL I. ANZAI
Petitioners,

v.

CHEVRON USA, INC.
Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

BRIEF OF THE STATES OF VERMONT, ALASKA, ARKANSAS, CALIFORNIA, FLORIDA, MAINE, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW YORK, OHIO, OREGON, RHODE ISLAND AND WASHINGTON, AND THE TERRITORIES OF THE NORTHERN MARIANA ISLANDS, PUERTO RICO AND THE VIRGIN ISLANDS, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

WILLIAM H. SORRELL
Attorney General of Vermont
* BRIDGET C. ASAY
Assistant Attorney General
109 State Street
Montpelier, Vermont 05602
(802) 828-5500

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First St., N.E.
Washington, D.C. 20002
(202) 326-6010

* *Counsel of Record*

[additional counsel listed on inside cover]

24pp

BRUCE M. BOTELHO
Attorney General of Alaska
P.O. Box 110300
Juneau, AK 99811

MARK PRYOR
Attorney General of Arkansas
200 Tower Building
Little Rock, AR 72201

BILL LOCKYER
Attorney General of California
1300 I Street, Suite 1740
Sacramento, CA 95814

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399

G. STEVEN ROWE
Attorney General of Maine
Six State House Station
Augusta, ME 04333

TOM REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108

JENNIFER M. GRANHOLM
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri
Supreme Court Building
207 West High Street
Jefferson City, MO 65101

MIKE MCGRATH
Attorney General of Montana
P.O. Box 201401
Helena, MT 59620

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, NV 89710

ELIOT SPITZER
Attorney General of New York
Department of Law-The Capitol
2nd Floor
Albany, NY 12224

HERBERT D. SOLL
Attorney General of Northern
Mariana Islands
Caller Box 10007
Saipan, MP 96950

BETTY D. MONTGOMERY
Attorney General of Ohio
State Office Tower
30 East Broad St.
Columbus, OH 43215

HARDY MYERS
Attorney General of Oregon
1162 Court Street, NE
Salem, OR 97310

ANABELLE RODRIGUEZ
Attorney General of Puerto Rico
Department of Justice
G.P.O. Box 9020192
San Juan, PR 00902

SHELDON WHITEHOUSE
Attorney General of Rhode
Island
150 South Main Street
Providence, RI 02903

IVER A. STRIDIRON
Attorney General of U.S. Virgin
Islands
48B-50C Kronprindsens Gade
GERS Building, 2nd Floor
St. Thomas, VI 00802

CHRISTINE O. GREGOIRE
Attorney General of
Washington
1125 Washington Street
Olympia, WA 98504-0100

QUESTIONS PRESENTED

1. Does the Takings Clause authorize a court to invalidate state rent control or land use regulatory legislation on its face, without regard to whether it diminishes economic value or use or causes any physical invasion of the plaintiff's property, when the court concludes that the statute does not substantially advance a legislative purpose?

2. Does the facial constitutional validity of state legislation depend on whether a federal court predicts that it will achieve its objective?

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INTEREST OF THE AMICI CURIAE

State governments, through their legislative and executive branches and through their municipal governments, are primarily responsible for maintaining the delicate balance between the interests of the public and the rights of individual property owners. As the Court recognized when it first heard a constitutional challenge to a zoning ordinance, land use regulation is a dynamic area of the law. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) ("[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands."). New patterns of growth and development, greater understanding of environmental harms, and a rapidly changing economy require the states to respond creatively and, on occasion, to experiment. The states are vitally interested in protecting their ability to legislate in this area free from the kind of judicial second-guessing authorized by the court below.

The decision of the Ninth Circuit in this case requires a court to invalidate land use or rent control legislation under the Takings Clause if the court, after its own independent review, concludes that the challenged law will not accomplish the legislature's intended goal. The *amici* states and territories routinely enact such legislation to respond to constantly changing economic pressures and environmental conditions. State legislatures need flexibility and discretion to craft reasonable solutions to contemporary problems. Indeed, the Court has long recognized that "[l]egislative bodies have broad scope to experiment with economic problems," *Ferguson v.*

Skrupa, 372 U.S. 726, 730 (1963), and has traditionally afforded states substantial discretion in exercising their police powers to further the public interest. The decision below, if permitted to stand, would significantly restrict the states' ability to regulate land use by requiring courts to evaluate, not the reasonableness of a regulation, but whether the legislature made the "correct" policy choice to respond to a particular problem. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("States are not required to convince the courts of the correctness of their legislative judgments.").

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's decision to subject land use regulation to heightened scrutiny raises an important issue for the states and invites expensive and intrusive legal challenges to ordinary social and economic legislation.

1. Without question, the Takings Clause and the Due Process Clause, as well as analogous provisions of most state constitutions, impose substantive and procedural limits on state regulatory measures. The Due Process Clause protects against arbitrary and irrational government action; the Takings Clause requires the government to provide compensation to an affected property owner when the government effects a physical taking or imposes such a burden on the use of property that it is akin to a physical taking. With the exception of physical takings in the form of exactions, however, this Court has not held that the Takings Clause requires courts to subject land use regulations to any form of heightened scrutiny. *See*

City of Monterey v. Del Monte Dunes, 526 U.S. 687, 703 (1999) (declining to extend the "rough proportionality" test for physical exactions to other land use regulations); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 242 (1984) (holding that whether statutory exercise of eminent domain power "'will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective'") (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-72 (1981)) (alteration in original).

The Ninth Circuit has unwisely chosen to depart from this Court's precedent and impose a stringent standard of review on land use regulations. Pet. App. 7 (holding that heightened scrutiny applies to land use regulations). That holding alone threatens to undermine the states' ongoing efforts to regulate land use in ways that benefit the public welfare and protect the reasonable expectations of property owners. The Court has recognized, albeit in a different context, that subjecting state laws to heightened scrutiny, what is sometimes termed "intermediate scrutiny," "require[s] searching judicial scrutiny of state law with the attendant likelihood of invalidation." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). This heightened standard of review represents a "considerable . . . intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.*

Even more troubling, however, is the content the Ninth Circuit gave to its heightened standard of review. The court specifically ordered the district court, on remand, to assume the legislative role, weigh

the competing opinions of expert economists, and decide for itself whether the challenged rent control statute will be effective. Pet. App. 17-20, 25. In so doing, the Ninth Circuit ignored this Court's repeated caution that "it is not the function of the courts to substitute their evaluation of legislative facts for that of the legislature." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 470. To borrow this Court's language, the Ninth Circuit's holding "goes too far" in authorizing courts to override legislative decisions about social and economic policy. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). And because virtually every government regulatory action can be attacked as a taking, the influence of the decision is certain to extend beyond land use and rent control measures.

2. A close look at the decision below illustrates the manner in which the Ninth Circuit's approach to takings law intrudes on legislative policy choices. As the Ninth Circuit recognized, Hawaii passed Act 257 in response to a difficult problem: "the highly concentrated gasoline market in Hawaii and the resulting high cost of gasoline to consumers." Pet. App. 3; *see also* Pet. App. 43 (district court opinion acknowledging "strongly felt concerns of the legislature that Hawaii's consumers are paying too much for gasoline"). Economists and other experts hold differing views on whether rent control regulations are a sound form of economic policy. *Compare, e.g.*, Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 Brooklyn L. Rev. 729 (1988), *with* Kenneth K. Baar, *Response: Would the Abolition of Rent Control Restore a Free Market?*, 54 Brooklyn L. Rev. 1231 (1989); *see generally* Jeffrey J. Minton, *Rent Control: Can and Should It Be Used to Combat*

Gentrification?, 23 Ohio N.U. L. Rev. 823 (1997) (analyzing rent control statutes in light of different economic models).

In this case, two contrasting policy viewpoints on the issue were provided by the expert economists who supplied affidavits for the state and Chevron, respectively. The state's expert concluded that the Act will benefit consumers by encouraging more dealers to stay in business, which in turn will lead to a greater supply and lower prices at the pump. Pet. App. 15-16. Chevron's expert disagreed, opining that the law will discourage oil companies from building new gasoline stations or maintaining old ones, thus further concentrating Hawaii's gasoline market and ultimately leading to higher prices. *Id.* at 16-17. The conflicting conclusions of these experts reflect significantly different policy views of the relevant market and the likely reactions of gasoline dealers and oil companies to the legislation. *Id.*

As these expert opinions suggest – and as is so often the case – the Hawaii Legislature could not fashion a response to the problem of high gasoline prices with the comfort of knowing that its chosen solution was certain to work. There is precious little certainty in the area of economic regulation. As Justice Frankfurter once observed, "[m]ost laws dealing with economic and social problems are matters of trial and error." *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538, 553 (1949) (Frankfurter, J., concurring). Rather than absolving its responsibility in the face of this uncertainty, however, the legislature made a reasonable policy choice that is reflected in Act 257. This is the type of

legislative judgment to which courts traditionally and appropriately defer.

The Ninth Circuit, however, pointedly declined to follow this usual rule of deference, and instead concluded that Act 257 was subject to heightened scrutiny under the Takings Clause. Accordingly, the district court on remand was instructed to determine, based on the competing opinions of the expert witnesses, whether Act 257 will succeed in lowering gasoline prices for consumers. Pet. App. 20, 25. The court recognized that the district court judge, like the legislature, could do no more than make an informed prediction about the likely success of the Act. *See id.* at 18 ("[a]dmittedly, these are questions of *predictive fact*") (emphasis added). But nowhere did the Ninth Circuit explain why the district court's judgment on the issue should be given greater weight than the judgment of the Hawaii Legislature.

By requiring judges to substitute their judgments for those of the legislature, the Ninth Circuit's decision has a significant impact on the authority of state legislatures to make social and economic policy choices. Like the Hawaii Legislature here, state legislatures routinely face problems to which there are a range of possible responses, any one of which may work – and none of which comes with a guarantee. "Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665

(1994).[1] Elected representatives rely on a wide range of evidence and on their experience and common sense to evaluate the conflicting views of interest groups, experts, and ordinary citizens. When a legislature chooses a policy that falls within the range of reasonable options, that decision should be respected by the courts. It is wholly inappropriate for a court to reweigh conflicting evidence and opinions in an effort to predict the success of a particular piece of legislation.[2] *See Hawaii Housing Auth. v. Midkiff*, 467

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[1] *Turner Broadcasting* involved a challenge to the FCC's must-carry rules for cable systems, which the Court concluded were subject to intermediate scrutiny under the First Amendment. 512 U.S. at 662-63. The Court's holding in *Turner I* is significant for two reasons. First, even in the First Amendment context, the Court nonetheless afforded "substantial deference" to the "predictive judgments" of Congress and stressed that the Court's "obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress' factual predictions with our own." *Id.* at 666. It is striking that the Ninth Circuit declined to extend similar deference to the Hawaii Legislature in reviewing an economic regulation that does not implicate fundamental constitutional rights. Second, the scope of the remand in *Turner I* illustrates the far greater burden placed on the government to defend laws and agency actions subject to heightened scrutiny. Although the legislature "compiled an extensive record in the course of reaching its judgment," *id.* at 669 (Blackmun, J., concurring), the Court nonetheless remanded the case for the government to present additional evidence and the district court to make findings regarding the interests at stake, the actual effects of the rules, and the possibility of less restrictive alternatives. *Id.* at 668. The Ninth Circuit would impose this type of substantial evidentiary burden on the government in the context of any regulatory takings claim.

[2] It is telling that the single case cited by the Ninth Circuit in support of requiring the district court to resolve this matter based on "predictive facts" is an access to records claim brought under

U.S. at 243 ("our cases make clear that empirical debates over the wisdom of takings – no less than debates over the wisdom of other kinds of socioeconomic legislation – are not to be carried out in the federal courts").

In *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), a case involving a similar state regulation of the gasoline market, this Court specifically refused to consider the "ultimate economic efficacy of the statute" in ruling on its constitutionality. *Id.* at 124-25. In response to the gasoline shortage in 1973, Maryland passed a law prohibiting producers and refiners from operating company-owned stations. The goal of the statute was to correct inequities in gasoline distribution – and therefore pricing – among independent and company-owned stations. The producers and refiners argued that the statute violated due process because "it [would] frustrate rather than further the State's desired goal of enhancing

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the Freedom of Information Act (FOIA). Pet. App. 18-20 (citing *Washington Post Co. v. United States*, 865 F.2d 320 (D.C. Cir. 1989)). FOIA affords no deference to agency decisions but rather "requires courts to review *de novo* agency claims of exemption, and . . . places on the agency the burden of defending its withholding of information." *CIA v. Sims*, 471 U.S. 159, 182 (1985) (Marshall, J., concurring) (citing 5 U.S.C. § 552(a)(4)(B)). In light of the burden imposed on the agency, *Washington Post* held that the district court could not accept the agency's conclusory affidavits regarding the possible effects of public disclosure, but instead had to weigh the competing evidence put forward by both parties. 865 F.2d at 326. Given the unusual posture of a FOIA claim, the holding in *Washington Post* was proper. But that holding has no bearing on the role of a court reviewing the validity of state legislation, which is presumed to be valid and constitutional.

competition." *Id.* at 124. The Court declined to engage in this debate, noting that an argument based "on an evaluation of the economic wisdom of the statute . . . cannot override the State's authority 'to legislate against what are found to be injurious practices in their internal commercial and business affairs.'" *Id.* (quoting *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536 (1949)).

Here, the task that the Ninth Circuit assigned the trial court will inevitably draw the courts into the realm of policymaking and speculation. What the lower court called "predictive facts" are not facts at all, but predictions, opinions – even educated guesses. To reach a decision on remand, the district court ultimately would have to choose between competing economic models, neither of which is a "fact" that can be "proven" in the ordinary sense. *See* Pet. App. 20 ("to determine whose predictions are more accurate," the district court must gain a "better understanding of the competitiveness of the market for the sale and purchase of lessee dealer rights and the elasticity of demand for gasoline"). This Court long ago recognized the danger of transforming economic theories into constitutional principles. *See, e.g., Ferguson v. Skrupa*, 372 U.S. at 730, 732 ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.").

3. One prediction that can be safely made, however, is that the decision below, if permitted to stand, will require states and local governments to

defend themselves against more numerous and more expensive challenges to land use and rent control regulations. *Cf. Eastern Enter., Inc. v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring) (recognizing that takings law is "one of the most difficult and litigated areas of the law"). More numerous, because the Ninth Circuit has significantly expanded the universe of regulations that are subject to Takings Clause challenges. In its decision, the Ninth Circuit implicitly recognized that Chevron may prevail on remand even though (1) Chevron made no showing that it was denied the economic viability of its property (and in fact, the Act permitted Chevron to charge more than it would otherwise have charged under its own rental program), *see* Pet. App. 25, and (2) the Hawaii Legislature had a rational basis for concluding that the Act would reduce gasoline prices for consumers. *Id.* at 7, 13. Expressed in more general terms, the Ninth Circuit's new Takings Clause rule goes as follows: where a legislature makes a rational policy decision to regulate land use or rents in a manner that imposes a relatively insignificant economic burden on the property owner, a Takings Clause challenge may nonetheless succeed if a property owner can show to a court's satisfaction that the regulation may not fulfill its intended purpose. As reasonable experts may be found to oppose virtually any economic or land use regulation, such a rule is nothing if not an invitation to litigation.

There is also little doubt that state and local governments will bear new and costly burdens in defending Takings Clause challenges under this rule. *Cf. City of Boerne*, 521 U.S. at 535 (noting the "heavy litigation burden" that RFRA's heightened scrutiny

would impose on the states). The Ninth Circuit has dramatically altered the level and type of proof required to support the constitutionality of land use regulation. *See, e.g., Heller v. Doe*, 509 U.S. 312, 319 (1993) (recognizing that, while rational-basis review "does not require the State to place any evidence in the record," an "extensive evidentiary showing" is required for a statute to survive heightened scrutiny). Presumably it no longer suffices for the state, in the face of conflicting evidence from the property owner, to rely on an ordinary legislative or administrative record that demonstrates a reasoned basis for the challenged regulation. Nor is it likely that a state can overcome a takings challenge prior to trial by presenting expert testimony that supports the reasonableness of the regulation. By eliminating these two options, the Ninth Circuit has made it nearly impossible for a state to prevail in pretrial proceedings, such as a motion for judgment on the pleadings or for summary judgment. As long as a property owner has an expert who will testify that a regulation will not achieve its intended purpose – as noted above, virtually a given in any case – the state must go to trial and present its own evidentiary case. *See, e.g., Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) (noting, in context of ballot access restrictions, that requiring state to provide empirical proof of predicate for legislation "would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State").

II. This case presents an opportunity for the Court to resolve an unsettled and important issue in takings law that has confused the lower courts and caused uncertainty for state and local governments.

In *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), the Court in dicta stated for the first time that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." Some years later, Justice Scalia, speaking for the Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987), noted that "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." More recently, Justice Kennedy has described the "substantially advances" test as existing "in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act." *Eastern Enter., Inc. v. Apfel*, 524 U.S. at 545 (Kennedy, J., concurring). And just two terms ago, the Court in *City of Monterey v. Del Monte Dunes* acknowledged that it has not provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions." 526 U.S. at 704.

This brief chronology illustrates two related and unsettled questions that are directly presented in this

case. First, despite the oft-repeated language in *Agins*, several members of the Court have questioned whether a means-end test, such as the "substantially advances" test, is or should be part of a Takings Clause analysis. Given the Ninth Circuit's ruling that Chevron has not been denied the economically viable use of its property, this case poses the as-yet-unanswered question whether a government regulation effects a taking *solely* because a court concludes that the regulation does not substantially advance a legitimate state interest. Second, if the "substantially advance" test is a proper part of takings jurisprudence, the Court has the opportunity here to establish the degree of scrutiny required under that test – or, put another way, to decide how closely the courts should analyze the "fit" between a regulation and its intended purpose.

A sampling of lower court decisions in this area reveals the degree of confusion that has taken hold and the consequent need for clarification by the Court. The California Supreme Court has struggled with the required means-end relationship under the Takings Clause, leading one justice specifically to ask this Court to decide whether "a means-ends test [should] be used to determine whether a taking has occurred, or instead should means-end testing remain within due process jurisprudence." *Santa Monica Beach, Ltd. v. Superior Court*, 968 P.2d 993, 1013 (Cal. 1999) (Kennard, J. concurring). Two state supreme courts have concluded that the Due Process Clause, not the Takings Clause, should govern review of the rationality of land use regulations. *See Brunelle v. Town of South Kingston*, 700 A.2d 1075, 1083-84 n.5 (R.I. 1997); *Mission Springs Inc. v. City of Spokane*, 954 P.2d 250, 257-58 (Wash. 1998). The Ninth Circuit,

however, has taken the opposite approach, ruling that due process challenges to the validity of land use regulations are "preempted" by the Takings Clause. *See Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996). Other courts entertain both types of claims, but apply the same standard to each. *See, e.g., Omya, Inc. v. Town of Middlebury*, 758 A.2d 777, 780 (Vt. 2000).

Not surprisingly, courts have also had trouble giving content to the means-end analysis under the Takings Clause. The Massachusetts Supreme Judicial Court noted its confusion in *Steinbergh v. City of Cambridge*, 604 N.E. 2d 1269 (1992), stating that the substantially advance test "*may express* a higher standard at least in certain circumstances than the rational basis test . . . . *It may be* that the degree of substantiality required varies depending on the character of the state's interest" in relation to the reduction in property value. *Id.* at 1276 (emphasis added). The *Steinbergh* court ultimately concluded, based on the legislative record, that the challenged rent control regulation did substantially advance a legitimate state interest – thus apparently, but not explicitly, equating the "substantially advance" test with the ordinary rational basis test. *Id.* at 746.

The New York Court of Appeals at one point took a very different approach, striking down a rent control provision under the Takings Clause after describing its "fundamental defect" as "no substantial advancement of a legitimate state interest and 'close causal nexus' required for the challenged regulatory enactment to survive scrutiny." *Manocherian v. Lenox Hill Hosp.*, 643 N.E. 2d 479, 487 (1994). But New York's high court has since retreated from this level of heightened

scrutiny, concluding that *Del Monte Dunes* limited the "essential nexus" test to exactions. *See Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 721 N.E.2d 971, 974-75 (1999) (describing the conflicting views as to the reach of this Court's holdings in *Nollan* and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). In *Bonnie Briar*, the court found that the challenged regulation "easily qualifies" as valid because it "bears a reasonable relation to the legitimate objectives stated." *Id.* at 976.

Notably, the owners of a Maryland property have recently asked this Court to review a decision of the Fourth Circuit upholding a local land use ordinance. In *Greenspring Racquet Club, Inc. v. Baltimore County*, the Fourth Circuit relied on the legislative record to conclude that the challenged zoning restrictions (which impose new height and density limits in certain areas) "substantially advance a legitimate state interest in controlling dense development in areas located near rural development zones." 232 F.3d 887, 2000 WL 1624496, at *5 (4th Cir. 2000) (unpublished table decision). The landowners now claim that the Fourth Circuit's review of the zoning regulations was too deferential, and that the lower court should have applied some form of heightened scrutiny to the challenged regulation. Petition for Writ of Cert. at 13, *Greenspring Racquet Club*, No. 00-1227. Although the *amici* do not support the petition in *Greenspring*, it is nonetheless striking that property owners, as well as state governments, are expressing confusion and uncertainty about the standard applied to regulatory takings claims. *See id.* at 15 ("It is imperative for the Court to address this issue directly and either clarify

the standards of the 'substantially advance' test of *Agins* or overrule *Agins* . . . .").

The conflicting and inconsistent approaches taken by the lower courts create an uncertain legal climate that hampers planning efforts, increases litigation costs, and, in some cases, encourages inappropriate forum shopping. The consequences are felt most directly by the states and their political subdivisions, because in our federal system, the states "have traditional and primary power over land and water use." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. ___ (2001), slip op. at 13. *Amici* urge the Court to take this opportunity to bring coherence to this area of the law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

WILLIAM H. SORRELL
Attorney General of Vermont
* BRIDGET C. ASAY
Assistant Attorney General
109 State Street
Montpelier, Vermont 05609
(802) 828-5500

Of Counsel:
Dan Schweitzer
National Association of
Attorneys General
750 First St., N.E., Suite 1100
Washington, D.C. 20002
(202) 326-6010

* *Counsel of Record*

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